ABUSE OF ELDER ABUSE

By Eric A. Schneider*

In 1982, the California legislature enacted the Abuse of the Elderly and Dependent Adults Act. The stated purpose of the Act was quite noble: to encourage health care professionals to report suspected cases of such abuse; to gather information on the subject to aid the State in establishing adequate services to aid all victims in a timely and compassionate manner, and to protect people who report such abuse.

Then in 1991, the legislature amended the Act to impose financial sanctions upon individuals or institutions which exercise or allow physical or financial abuse to be perpetrated upon elder or dependent adults, and criminal penalties in circumstances where the elder or dependent adult is wilfully placed in a position where he or she is likely to face great bodily harm or death. The potential civil liability for abusers is quite severe. Successful plaintiffs can in certain circumstances recover punitive damages and attorney fees. Such damages and attorneys fees many times can dwarf the amounts awarded for medical bills and their pain and suffering. Worse yet, punitive damages cannot be covered by insurance.

Again, on its face the legislation would seem to protect those who otherwise could not protect themselves. No one would argue that patients at nursing homes deserve protection from personnel who would physically torture them for sport, or that the law should discourage and punish care givers who sexually abuse developmentally disabled adults. Such extreme situations however do not arise often. Instead plaintiff attorneys seek to invoke the imposing penalties provided for under the Act for circumstances the Act simply was not designed to address. Examples of such inappropriate cases include:

1. Claims against apartment buildings which are not care custodians. "Care custodian" is broadly defined under the Act to include not only hospitals and clinics, but a number of other public and private organizations so long as they provide "health services or **social services** to elders or dependent adults." The fact that caring management for a building largely populated by elderly or dependent adults chooses to host bingo games or invite podiatrists onto the premises to conduct free foot exams should not render that management a care custodian within the meaning of the Act;

2. Lawsuits under the Act which arise out of elderly people slipping on wet tile or tripping over something inadvertently left in a hallway. "Physical abuse" is defined in the Act mean violent acts such as assault and rape, and courts should interpret it as such. While people with meritorious claims for other personal injury should be compensated as should anyone else, they should not be entitled to the heightened remedies afforded under the Act when there has not been "physical abuse"; and

3. Claims for punitive damages against building management and ownership for the acts of their personnel when the employer had no basis for suspecting that the employees in question were unfit for their jobs. The Act and other California law limit claims for punitive damages against employers for the acts of their employees to circumstances where management personnel committed the wrongful acts; the employer knowingly employed personnel it knew to be unfit; or the employer either authorized the wrongful conduct in advance or ratified (approved) the wrongful conduct after the fact.

One would expect that claims such as these would not be made under the Act because they so obviously would not fit. Such is not the case however, both in our litigious society generally and in Southern California in particular. If a plaintiff attorney is going to file suit on behalf of an elder or a dependent adult, he or she could and often does choose to increase the liability exposure and the cost of defending the litigation by including unwarranted claims under the Act. Not only are the defendants placed in a more vulnerable position by having additional claims to defend against, but the claims themselves may not be covered risks under the defendant's insurance policy.

Given this backdrop, what can an owner or manager of affordable housing do to protect against claims under the Act? Unfortunately, there is no way to absolutely safeguard against such claims, but the steps set forth below may serve either to reduce the likelihood of the institution of litigation under the Act, or at least help keep the specter of punitive damages and uncovered claims to a minimum:

1. Carefully screen on-site job applicants. Make sure that job applications are fully completed and that references are checked, and obtain a criminal background check. Not only can having personnel that the employer knows to be unfit result in uncovered punitive damages claims, but a solid screening process can result in an actual defense to a claim, particularly where the act of the employee would be found to be outside the course and scope of employment, such as with an assault. Screened employees are also more likely to turn out to be better employees; and

2. Promptly and thoroughly investigate any claims of improper conduct on the part of on-site personnel. The failure to investigate itself can result in liability, and the failure to address wrongful conduct can in certain instances be considered ratification of that conduct This too is a good general practice regardless of the susceptibility of claims under the Act.

*The author is an AHMA associate member who regularly defends affordable housing management and owners against personal injury claims including those brought pursuant to the Abuse of the Elderly and Dependent Adults Act. This article was written to provide general information concerning the Act and is not intended to substitute for legal advice. Management and ownership should seek advice from their counsel both as to specific claims and as to operations generally. This

article was written solely as an introduction to Abuse of the Elderly and Dependent Adults Act, and many of the terms and definitions have been simplified for the benefit of non-attorneys.

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